No. 80-1406

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

IRVING L. GARTENBERG,

Petitioner,

—vs.—

HONORABLE MILTON POLLACK, JUDGE, UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK (MERRILL LYNCH ASSET MANAGEMENT, INC., MERRILL LYNCH, PIERCE, FENNER & SMITH, INC. and MERRILL LYNCH READY ASSETS TRUST, real parties in interest),

Respondents.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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Respondents.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

I. The question presented is of such exceptional importance that immediate review is both appropriate and necessary.

1. Respondents do not dispute that at least eleven other cases pending under § 36(b) of the Investment Company Act, 15 USC § 80a-35(b), involve precisely the same jury question here presented (see Pet. 4-5). The fact that a considerable number of other suits will turn on the resolution of the question presented here is certainly reason enough for granting the writ, particularly since the court below has decided a federal question contrary to an applicable decision of this Court. *Massachusetts Trustees v. U.S.*, 377 U.S. 235, 237 (1964).

Although respondents deny the conflict (Br. 19), it is evident. The Court of Appeals acknowledged (3a) that an action for damages may be brought under § 36(b) but, looking to the complaint which does not actually use the word "damages," held that petitioner is not entitled to a jury trial because "He alleges no damage and seeks no damages" (6a). This holding is in direct conflict with *Dairy Queen v. Wood,* 369 U.S. 469, 477-78 (1962), which held that "the constitutional right to trial by jury cannot be made to depend upon the choice of words used in the pleadings." As shown below (pp. 8, 9, *infra*), the Court of Appeals' decision is also in conflict with *Simler v. Conner,* 372 U.S. 221 (1963), and with *Beacon Theatres v. Westover,* 359 U.S. 500 (1959).

2. Respondents do not dispute this Court's long tradition of holding that the constitutional right to trial by jury is such a fundamental element of federal jurisprudence that any seeming curtailment thereof must be promptly and carefully scrutinized (Pet. 5-6). In an attempt to divert attention from this controlling body of law, respondents argue (Br. 17-18) that this Court is "disinclined" to review interlocutory decisions. The simple answer is that this Court has consistently granted review of interlocutory decisions involving the right of jury trial. *Hidalgo v. Nakshian,* ____ U.S. ____, 66 L.Ed.2d 467 (No. 80-242, Dec. 1, 1980), granting certiorari to review *Nakshian v. Claytor,* 628 F.2d 59 (D.C. Cir. 1980); *Lorillard v. Pons,* 434 U.S. 575 (1978); *Ross v. Bernhard,* 396 U.S. 531 (1970); *Dairy Queen, supra, 369 U.S. 469; Beacon Theatres, supra,* 359 U.S. 500, *In re Simons,* 247 U.S. 231 (1918). In *Dairy Queen* and in *Beacon Theatres,* just as in the present case, the Court of Appeals denied an application for mandamus seeking to enforce the right to jury trial; the granting of certiorari in these cases seems, therefore, particularly pertinent to the case at bar.*

3. Respondents' contention that the writ should be denied in order to avoid delay in the proceedings below is equally

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* The denial of certiorari in the cases cited by respondents (Br. 17-18) is of no significance. None of those cases presented a substantial Seventh Amendment question.

unavailing. Respondents' claim (Br. 7-8, 18) that petitioner never sought a stay of the proceedings below is altogether misleading. As recently as March 13, 1981, Judge Pollack, in a conference call with counsel for the parties, suggested that submission of the pretrial papers be delayed pending this Court's resolution of the petition for certiorari. Counsel for petitioner agreed; it was counsel for respondents who insisted on proceeding promptly. In any event, no date for the trial or even for a pretrial conference has been set, and the granting of certiorari would cause no waste of effort since the pretrial documents prepared so far consist largely of stipulated facts, proposed conclusions of law, and summaries of expert testimony—all of which is as useful for a jury trial as for a bench trial.

We submit that this case presents indeed compelling reasons for granting the writ.

II. The legislative history of § 36(b) lends no support to the denial of jury trial.

Respondents' brief (5,10-12) invokes the District Court's holding that the legislative history of § 36(b) establishes the intent of Congress to create an equitable cause of action and hence to withhold any right to jury trial. The Court of Appeals did not adopt that reasoning, and it is indeed untenable.

In short, the Reports of the Senate Committee* and of the House Committee** preceding the enactment of § 36(b) referred, in identical language, to § 36(b) as authorizing the SEC and any shareholder of a fund to bring "an equitable action involving a claim of breach of fiduciary duty" (Senate Report 16; House Report 38). The titles of the bills in question indicated that the bills were intended "to define the equitable standards governing relationships between investment com-

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* Report No. 91-184 of the Senate Committee on Banking and Currency, to accompany S.2224, 91st Cong., 1st Sess., May 21, 1969.

** Report No. 91-1382 of the House Committee on Interstate and Foreign Commerce, to accompany H.R. 17333, 91st Cong., 2nd Sess., August 7, 1970.

panies and investment advisers" (S. 2224; H.R. 17333).* These are the statements by which Congress supposedly precluded the right of jury trial in actions under § 36(b).

1. As the Court of Appeals noted, Congress "made no express provision in the statute for non-jury enforcement", and "the revised statute is silent on this point" (3a). Certainly, a jury right otherwise existing cannot be taken away without legislation to that effect. There exists no such legislation.

2. If, as we contend, a § 36(b) claim is a legal claim for damages or for money had and received, the Seventh Amendment preserves the right of jury trial, and Congress has no power to overrule the Constitution by denying the jury right. *Atlas Roofing Co. v. Occupational Safety Comm'n,* 430 U.S. 442, 460-61 and note 16 (1977); *Pernell v. Southall Realty,* 416 U.S. 363, 383 (1974); *Curtis v. Loether,* 415 U.S. 189, 194-95 (1974). Congress can withhold a jury right from an otherwise legal claim only by providing for its enforcement in an administrative proceeding or before a bankruptcy court or similar exclusively equitable tribunal; *Atlas Roofing, supra,* 430 U.S. at 453-55; *Curtis, supra,* 415 U.S. at 194-96. No such provision exists under § 36(b) and, in its absence, "The Seventh Amendment prevents Congress from depriving a litigant of a jury trial in a 'legal' action before a tribunal customarily utilizing a jury as its fact finding arm", *Atlas Roofing, supra,* 430 U.S. at 460-61 and note 16. Nor can Congress escape the constitutional limitations of its power by calling "equitable" what actually is a legal claim; "this Court has the final decision on the question whether a jury is required", *Atlas Roofing, supra,* 430 U.S. at 461, note 16.

3. Suits under § 36(b) may well be "equitable actions", as the Senate and House Committees noted, but that does not foreclose the right to jury trial of legal issues arising in such actions. Stockholders' suits under § 36(b) are derivative suits; both courts below so held (2a, 8a), and we agree. Derivative suits are indeed equitable actions, for "the stockholder's right

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* The portions of the House Report (p.1) and the Conference Report quoted by respondents (Br. 10, 11) actually just recite the titles of the bills.

to sue on behalf of the corporation [is] historically an equitable matter", *Ross v. Bernhard, supra,* 396 U.S. at 538. But "[t]he Seventh Amendment question depends on the nature of the issue to be tried rather than the character of the overall action", *Ross, ibid.* Hence "the right to jury trial attaches to those issues in derivative actions as to which the corporation, if it had been suing in its own right, would have been entitled to a jury", *Ross,* 396 U.S. at 532-33. The characterization of § 36(b) actions as equitable does not, therefore, preclude the right to jury trial of the legal issues in such suits.

4. There is no doubt that the relationship between an investment company and its investment adviser is of a fiduciary nature and therefore governed by "equitable standards," as the titles of the Senate and House bills indicated. But it does not follow, as respondents contend, than an action for breach of the fiduciary duty is equitable rather than legal. To this question we now turn.

III. A claim for breach of fiduciary duty is a legal claim triable by jury.

Respondents' brief (9) invokes the District Court's holding (18a) that actions based upon breaches of fiduciary duty sound in equity. The Court of Appeals did not adopt that ruling, and it is in error.

Damage actions for misconduct of fiduciaries are universally held to be actions at law and, therefore, triable by jury. *Ross v. Bernhard, supra,* 396 U.S. at 542 (corporation's damage claim against directors for negligent breach of fiduciary duty); *Bruce v. Bohanon,* 436 F.2d 733, 736 (10th Cir. 1970), *cert. denied,* 403 U.S. 918 (1971) (damage claim for misappropriation of trade information entrusted to defendants on confidential basis).* As summarized in 30 C.J.S., Equity, § 28, pp. 835-36 (1965):

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* Accord: *National Union Elec. Corp. v. Wilson,* 434 F.2d 986, 988 (6th Cir. 1970) (corporation's damage claim against former officers and employees for breach of fiduciary duty); *Halladay v. Verschoor,* 381 F.2d 100, 109 (8th Cir. 1967) (damage claim against defendant who participated in wrongful transactions of testamentary trustee); *DePinto*

> Ordinarily, one must rely on his remedy at law against an attorney, an agent, or other fiduciary, or a public officer, for negligence or misconduct.

Similarly, a restitution claim, even if based on breach of a fiduciary duty, is triable by jury; *Roberts v. Ely,* 113 N.Y. 128, 131-32 (1889):

> * * * the case falls within the familiar doctrine that money in the hands of one person, to which another is equitably entitled, may be recovered in a common-law action by the equitable owner upon an implied promise arising from the duty of the person in possession *to account for and pay over the same* to the person beneficially entitled. The action for money had and received to the use of another is the form in which courts of common law enforce the equitable obligation. * * *
> * * * *the fact that money in the hands of one person is impressed with a trust in favor of another, or that the relation between them has a trust character, does not, ipso facto, exclude the jurisdiction of courts of law. (Emphasis added)*

Respondents (Br. 16) would distinguish *Roberts* because the present complaint asks for an accounting; but *Roberts* makes clear that the common law action for money had and received lies to enforce the implied promise of a person in possession of money "to account for and pay over the same" to the person beneficially entitled thereto. The exception for "cases of express trusts" (113 N.Y. at 132) is here inapplicable since the Adviser is not a trustee of an express trust.

In keeping with the rule of *Roberts v. Ely,* actions against corporate directors for moneys improperly received by them

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v. Provident Security Life Ins. Co., 323 F.2d 826, 836-37 (9th Cir. 1963), *cert. denied,* 376 U.S. 950 (1964) (corporation's damage claim against directors for breach of fiduciary duty); *Robine v. Ryan,* 310 F.2d 797, 798 (2d Cir. 1962) (damage claim for defendant's wrongful appropriation of plaintiff's invention in breach of confidential relationship); *Kelly v. Dolan,* 233 F. 635, 637 (3d Cir. 1916) (damage claim against corporate directors for breach of fiduciary duty).

are legal actions for money had and received; *Gottfried v. Gottfried,* 269 App. Div. 413, 56 N.Y.S. 2d 50, 59-60 (1945); *Myer v. Myer,* 271 App. Div. 465, 66 N.Y.S. 2d 83, 93-94 (1946), *aff'd,* 296 N.Y. 979 (1947). An otherwise legal claim for damages or restitution thus does not become equitable because it rests on a breach of fiduciary duty.

IV. A claim under § 36(b), whether for damages or for restitution, involves legal issues triable by jury.

1. It is our primary position that an action under § 36(b) is one for damages and that damages are "the traditional form of relief offered in the courts of law"; *Curtis v. Loether, supra,* 415 U.S. at 196 and note 11. Incredibly, respondents (Br. 6) read *Curtis* as holding that "not all claims for money damages are triable to a jury". What *Curtis* does say is that an award of "monetary relief" is not necessarily legal, 415 U.S. at 196. This is a far cry from respondents' contention.

Respondents (Br. 12-13) invoke the District Court's holding that the term "damages" in § 36(b) is used "merely as a shorthand for 'recovery of money' " (19a). It is elementary, however, that "[t]he law uses familiar legal expressions in their familiar legal sense;" *Bradley v. U.S.,* 410 U.S. 605, 609 (1973); *Lorillard v. Pons, supra,* 434 U.S. at 583. The word "damages" is such a "familiar legal expression". Nothing in the language or the context of § 36(b) indicates that it means anything but damages. To the contrary, § 36(b)(3) provides that "[a]ny award of damages *** shall be limited to the *actual damages* resulting from the breach of fiduciary duty" (emphasis added). "Actual damages" certainly are damages in the conventional sense.

The Court of Appeals did not question the availability of damages under the statute, but noted from § 36(b)(3) that "other relief" is also available (3a). It denied damages in this case because petitioner "alleges no damage and seeks no damages" (6a). The complaint, however, alleges that the advisory fees paid by the Trust to the Adviser were "excessive and completely disproportionate to the services rendered in return therefor" (28a). Obviously the Trust has been damaged by

paying more for the Adviser's services than they were worth. By finding no allegation of damage, the Court thus failed to accord to the complaint the liberal interpretation to which it is entitled, *Beacon Theatres v. Westover, supra,* 359 U.S. at 506.

2. Even if the claim be one for restitution, petitioner is entitled to a jury trial. Respondents now concede (Br. 15) that, "in some instances", restitution is available in actions at law, but they contend that, "in circumstances such as those presented here", restitution is purely equitable (*ibid.*). Unfortunately respondents do not tell in what "instances" restitution is a legal remedy, nor do they indicate the "circumstances presented here" which are supposed to render restitution purely equitable.

Respondents' reticence has good reasons. *Every* claim for restitution can be brought as a common law action. "A cause of action for restitution is a type of the broader cause of action for money had and received", *Atlantic Coast Line R. Co. v. Florida,* 295 U.S. 301, 309 (1935); although "equitable in origin and function" (*ibid.*), it is "an action at law", the lineal successor of the common count in indebitatus assumpsit for money had and received", *Stone v. White,* 301 U.S. 532, 534 (1937). Respondents' attempt (Br. 16) to distinguish restitution from money had and received is thus unavailing. Restitution lies within the concurrent jurisdiction of law and equity. "In substance the principles underlying restitution, whether at law or in equity, are much the same"; 5 *Moore's Federal Practice* ¶ 38.24[2], p. 38-195 (2d Ed. 1980).

Respondents' reliance on *SEC v. Commonwealth Chemical Securities,* 574 F.2d 90 (2d Cir. 1978), is misplaced. This was an action by the SEC under the securities laws for an injunction and disgorgement of profits. In denying a jury demand of the defendants, the court emphasized that the action was for an injunction and was brought by the SEC rather than by private parties, "Disgorgement of profits *in an action brought by the SEC* to enjoin violations of the securities laws appears to fit this description [of an equitable suit]" (574 F.2d at 95; emphasis added). The court went on (p. 96) to "agree with what Judge Weinfeld said on this subject in *SEC v. Petrofunds, Inc.,*

420 F.Supp. 958 (S.D.N.Y. 1976)". In the latter case, Judge Weinfeld emphasized the "critical distinction between actions brought by the SEC and actions brought by private litigants" (420 F.Supp. at 960). Since the present action is not brought by the SEC, *Commonwealth Chemical* is inapplicable.*

3. Respondents (Br. 7) rely on the holding below that "The issue in this case involves the equitable inquiry whether the Trust adviser violated its fiduciary obligations by charging an exorbitant fee" (5a). No authority is cited for the supposedly equitable nature of this issue, and *Simler v. Conner,* 372 U.S. 221 (1963), is directly contrary.

The plaintiff in *Simler* retained the defendant lawyer for a litigation and agreed to pay him a reasonable fee in the event of success. A later agreement of the parties set the fee at specified percentages of the recovery. After successful conclusion of the litigation, the plaintiff sued for a declaration of the amount of his liability, contending that the second agreement resulted from fraud and overreaching by the lawyer.** This Court held that "[t]he questions involved are traditional common-law issues which can be and should have been submitted to a jury . . ." (372 U.S. at 223).

The defendant lawyer in *Simler* was a fiduciary of his client; so is the defendant Adviser here. The lawyer's fiduciary duty forbade him to take an excessive fee; the Adviser is under the same fiduciary duty. The issues in *Simler* were whether the contractual fee percentages were excessive and, if so, what was a reasonable fee; the issues in the case at bar are precisely the same. Since "[t]he questions involved" in *Simler* were held to be "traditional common-law issues" which "should [be] submitted to a jury", the issues in the case at bar are likewise jury issues.

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* Respondents' other authorities (Br. 14n.) are inapplicable for the same reason.

** The facts appear more fully in *Simler v. Conner,* 282 F.2d 382 (10th Cir. 1960).

CONCLUSION

The petition for a writ of certiorari should be granted and the order below should be reversed.

Dated: New York, New York
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